NATIONAL REFORM UNION PAMPHLETS.

THE ILLEGALITY OF MARTIAL LAW IN CAPE COLONY.

A Speech delivered by the

RIGHT HON. LORD COLERIDGE

In the House of Lords on March 17th, 1902.

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The Illegality of Martial Law in Cape Colony.

In the House of Lords, on March 17th, Lord Spencer moved that an humble Address be presented to His Majesty for papers referring to the exercise of Martial Law by the officers of His Majesty's Military Forces in Cape Colony or in Natal over civilian subjects of His Majesty, including returns of :—

(1) The number of cases of civilian subjects of His Majesty tried by court-martial in the Cape Colony and Natal.
(2) The number of members constituting each court, with their military rank, and stating what number (if any) were civilians.
(3) The places where the courts sat.
(4) The sentences passed by the courts.
(5) Any alterations of the sentences made by the Executive.

In supporting the motion, Lord Coleridge spoke as follows :

My Lords, I desire to associate myself with the motion of the noble Earl, upon which, happily, no question of the war, and no question as to the mode in which military operations are being conducted, can arise. I shall limit myself strictly to the character and application of Martial Law to British subjects at the Cape. I distinguish that from military law, because, where persons are subject to military law, they voluntarily give up a great many of their rights as citizens. Martial law may be imposed by legislative enactment, and if it is, it is by that enactment that it gets its legal sanction. But the Constitution of the Cape is at present suspended, and Martial Law is being applied by the mere *fiat* of the Executive. As such it is unknown to the Constitution, and is, in fact, a state of no-law. It is prohibited by all the great statutes which preserve English liberty ; it is prohibited by Magna Charta, by the Petition of Right, and

by the Act of Settlement. Every year we pass the Army Annual Act, in which the imposition of martial law upon civilians is expressly prohibited—prohibited, it is true, in time of peace. Martial law is the supercession or abrogation of the ordinary criminal and civil jurisdiction. It is a violation of the Constitution. Under it, persons may be apprehended without warrant; they may be arrested without any charge being preferred against them; they may be kept in prison for an indefinite time without being tried; they may be deprived of the right of trial by jury or trial before a civil magistrate; they may ask in vain even for legal assistance, or for the protection of the laws of evidence; they may have their homes searched, their property confiscated, and their lives taken. No wonder it is a violation of the Constitution, for it is the embodiment of pure force, the imposition of the mere will or whim of the military officer, and it is a denial to the subject of every civil right and remedy. It is a tremendous power to put into the hands of any human agency, even if it were applied in the most peaceful times and by the most judicial and experienced men. But applied in times of public excitement by men of one party to men of another, applied by men of one race to men of another race, and applied by men not judicial and experienced, the danger to life and liberty is increased from something like a risk to something like a certainty. How, then, does this law come into being? It comes into force only by necessity to take the place of the ordinary law when the King's Writ cannot run, and when the ordinary law is inefficacious. Then, and then only, does the necessity arise, which is the only justification for the imposition of Martial Law. We have had three great rebellions in this country since the well-known definition of Martial Law by our great authorities. We had the Monmouth rebellion in 1695, and the two Jacobite risings in 1715 and 1745, but no attempt was made on any one of these occasions to deliver over the rebels for trial by Martial Law. In 1780, at the time of the Lord George Gordon riots, when London was given over to sack and pillage,

the mere rumour that the criminals were to be tried by Martial Law produced an indignant remonstrance on the part of the Executive of the day, and a Proclamation declaring that the persons inculpated would be tried by the ordinary law of the land. At the time of the Irish rebellion, the superiority of the civil law was asserted by the Chief Justice of Ireland. In 1824 Sir James Mackintosh, a high authority, used these words :—

> " The only principle on which the law of England tolerates what is called Martial Law is necessity ; its introduction can only be justified by necessity. When foreign invasion or civil war renders it impossible for the Courts of Law to sit or to enforce the execution of their judgments, it becomes necessary to find some rude substitute for them. As soon as the law can act, every other mode of punishing a supposed crime is in itself an enormous crime."

In the year 1838 the Law Officers of the day—afterwards Lord Campbell and Lord Cranworth—gave this advice to the Government :—

> " When the regular courts are open, so that criminals might be delivered over to them to be dealt with according to law, there is not, as we conceive, any right in the Crown to adopt any other course of procedure."

In 1861 that doctrine was emphasised by Chief Justice Taney of the Supreme Court of the United States, acting on legal precedent. In 1867 Lord Chief Justice Cockburn, Lord Blackburn, and others were of the same opinion ; and only a few days ago Chief Baron Palles in Ireland said :—

> " He could not take upon himself the responsibility of laying down such a law as that, if there was a rebellion in any part of the country, the whole population of the country was to be subjected to the licence of officers and the forces of the Crown. It might be done; but, if so, it would be done by some court of which he did not form a part."

Assuming that I am correct in saying that Martial Law arises from necessity, and necessity alone, the test of necessity is whether the ordinary law is efficacious. What has been done at the Cape? Martial law has been proclaimed throughout the whole of Cape Colony. No lawyer in or out of this House will suggest that that proclamation carries with it any legal sanction. The foreign idea of a state of siege is happily unknown to our Constitution. To declare otherwise would give the Executive power at will to suspend at once all civil liberty. As I say, Martial Law has been proclaimed throughout the whole of Cape Colony. It has been proclaimed over districts where no rebellion has ever taken place, where no shot has ever been fired, where no military operation has ever been conducted and, moreover, where the courts have been regularly sitting and enforcing the ordinary law of the land. Civilians have been snatched away from the jurisdiction of the ordinary courts, imprisoned without trial, or tried before courts martial. At Kimberley and at Oudsthoorn, Supreme Court judges were sitting at Assizes, and military officers were sitting at courts martial at the same time and in the same place. The civil courts are powerless where the military authorities illegally defy them. I would cite the case of a Dr. Reinecke, who was arrested on August 27th by an order of the Commandant. He was carried off to Malmesbury and imprisoned for three weeks without any charge being preferred. On September 18th he was charged with a breach of a Martial Law regulation, no evidence being given against him. At that time the Circuit Court was sitting at Malmesbury, and Chief Justice Buchanan, in answer to an application for his *habeas corpus*, ordered him to be released. But the instant he was released he was re-arrested by the military authorities and hustled off elsewhere, and for aught I know this doctor may be under arrest still. It may be said that that is a proof that the ordinary tribunals cannot enforce their orders: that the law is, in fact, in abeyance, and that the necessary requisites of Martial Law prevail. But the military authorities cannot be allowed to plead their own high-handed action as a proof that the ordinary law is suspended. Our forefathers took a very serious view of these things, because, in the reign of Charles II., by an Act of 1679, any person recommitting to prison any one who was released on his *habeas corpus* rendered himself liable to a fine of at least £500 to the man whom he had deprived of his liberty. During last year the Supreme Courts were sitting regularly at Cape Town, Kimberley, and Grahamstown, and there have been no substantial commandoes in the whole of Cape Colony since February, 1901.

The noble Earl has referred to some wise, humane, and, I think, legal regulations issued by Lord Carnarvon in 1867. Those regulations were alluded to by Sir M. Hicks-Beach in 1878, and were recommended by him in a Circular to all the Governors of the Colonies. They come, therefore, with the sanction, presumably in the first instance of the Law Officers of the Crown, and, secondly, of two successive Secretaries of State for the Colonies. What do those regulations enjoin? Three points stand out clearly. In the first place, it is laid down that nothing short of unavoidable necessity should justify the infliction of capital punishment on the authority of only three officers. That regulation, I believe, has been generally disregarded. In the second place, they recommend that care should be taken to afford persons every reasonable facility of making their defence. But over and over again prisoners have been refused leave by the military authorities to consult their legal advisers. Thirdly, the regulations laid down that, as the sentences of a court martial may not avail beyond the term of Martial Law, no sentences of imprisonment or penal servitude beyond that term should be awarded. The noble Earl has recapitulated the terrible list of executions and sentences of penal servitude for life and for other various terms. I would ask the Government whether these regulations have been shown to the authorities at the Cape, and, if not, why not? If they have, why have they been neglected? When I reflect on the excitement of public feeling, the non-judicial and inexperienced character of the tribunal, the frequent refusal to allow prisoners legal assistance, the difficulty of obtaining witnesses for the defence, the difficulty of language, the unreliability of native testimony—when I reflect on these things, I am perforce filled with grave misgivings as to the justice of many of the sentences. It may be said that a Bill of Indemnity may give legal sanction to these sentences; but if so, what is the precedent? All Bills of Indemnity that have ever been passed have only indemnified the authors of the sentences from legal action at the hands of those whom they have sentenced; never has an Act of Parliament sanctioned any sentence of a court martial which has endured beyond the period of Martial Law. If your Lordships are to sanction these sentences, you will have to do it by Act of Parliament, and you will be setting a bad precedent in English history. When Martial Law is over, by the law of England every prisoner under Martial Law is entitled to be instantly released. To justify detention there must be legislative enactments, which shall sanction the sentences that have been passed. Then why permit these sentences to be imposed? I know you cannot bring the dead

to life, but you can, at any rate, refrain from approving of sentences which, if you follow legal precedent, can never ultimately be carried into legal effect. In July last, ten men, all under thirty years of age, were sent for penal servitude for life to Bermuda. I ask whatever noble Lord it is who will reply to this Motion a question which I hope he will answer. By what legal justification do the authorities at Bermuda detain any one of those prisoners by a single hour? I hope the noble Lord will not forget that question, and will give me such answer as he is instructed to give. We have sent men under sentence of death from the place where they were condemned to be executed in districts where their relatives and friends live. The only precedent I can find in English history for such conduct is the precedent of Judge Jeffreys at the Bloody Assizes, and I trust that that is not a precedent which His Majesty's Government are anxious to follow.

But the worst remains. We have ordered the friends and relatives and compatriots of the condemned men to attend their dying moments. Will any noble Lord in this House get up and justify that, or recommend a repetition of such conduct? I trust for the honour of this House that no noble Lord will respond to that appeal. On one occasion, at one of these compulsory attendances, the Commandant stepped forward and thought it decent to call for three cheers for the King. Our late Queen, "*clarum et venerabile nomen*," by her personality and character was justly beloved by her Dutch subjects in South Africa. Do you think that this is the way to endear the King to the hearts of his Dutch subjects? It is said, "Oh, but these men are disloyal." Disloyal to what? What is loyalty? Loyalty is respect for and obedience to the law. You have no right to call men disloyal when you have taken away from them the object of their veneration. We call ourselves loyal. Let us then be scrupulous in our observance of the law. Let us obey the wisdom, the humanity, and the legality of Lord Carnarvon's regulations. Let us remove from those districts where the civil law holds supreme sway the iron and capricious hand of Martial Law. Remember the character of the race with which you have to deal. They are a race, large, slow, still; a race easy to manage, difficult to rouse, but when once roused, indomitable and not to be appeased. It may be too late; I hope it is not. But if you follow the policy which I have indicated, you will, at any rate, do more to quell disaffection than can be done by all the harrying under Martial Law, all the fines and imprisonment, all the hangings and shootings, all the marches and counter marches of innumerable troops over the broad face of Cape Colony